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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1089

CALIFORNIA SHIPPING CO., INC. and
FRED F. NOONAN CO., INC.,
Petitioners

vs.

PACIFIC FAR EAST LINE, INC., and
UNITED STATES LINES, INC.,
Respondents

Brief of Respondent United States Lines, Inc. in Opposition to Petition for Writ of Certiorari

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STATEMENT OF THE CASE

Petitioners describe this case as "an anti-trust action." A full reading of the petition and its appendices will show that the case could be more accurately described as one involving the failure to complete the sale of a vessel because the price was too low. Because the seller was a United States subsidized operator, the sale price was subject to government approval. The Chief, Office of Government Aids, one Aptaker, the man who alone had the power to approve or disapprove of such sales (see District Court Opinion, Petition, Appendix B, p. vi), testified that he

would not have approved the sale at any time during which the pertinent sale agreement could have been submitted to him.[1] He also gave good reasons why not, which reasons are reviewed in the opinion of the District Court. As the Court of Appeals for the Ninth Circuit noted in its concise opinion, appellants (petitioners here) came forward with no evidence to the contrary, although discovery procedures, including interrogatories and depositions, were extensively employed on the motion for summary judgment.

ARGUMENT

Plaintiffs in this action offered no evidence that the sale would have been approved, the issue on which summary judgment was granted. In effect, petitioner is asking this Court to send the case back so that they may have the opportunity to dig up conflicting evidence or to test the credibility of a witness. The letter and spirit of FRCP 56 are that a party opposing a motion for summary judgment is not entitled to hold his evidence back, nor is he entitled to a trial on the possibility that an issue of material fact might turn up at the trial. Nor should cases be kept open on the possibility that an uncontradicted witness might be somehow impeached on cross-examination [*Prysiuski v. Holland*, 228 F. Supp. 959 (E.D. Wis. 1964); *Morris v. Brickman*, 95 F. Supp. 605 (D.C. Cir. 1951) aff'd 196 F.2d 762 (1952); *Lavine v. Shapiro*, 257 F.2d 14 (7th Cir. 1958)] especially where, as here, cross-interrogatories to the per-

1. The "anti-trust" aspect of the case consisted of the allegation that the sale being negotiated in early December was not submitted to the Government until late November due to a conspiracy between the present respondents. The trial court assumed these allegations to be true for the purposes of its ruling. Therefore, they are not at issue here.

tinent witness have already been submitted and answered. Petitioner's attack on this judgment would, if valid, prevent any summary judgment and renders Rule 56 a nullity, since there is no conceivable Rule 56 decision that could not be similarly attacked.

This is not a case like *Adickes v. Kress & Co.*, 398 U.S. 144 (1970) (Petition p. 7), where the respondent simply failed to meet its initial burden to establish that policemen were not in a store by "for example, submitting affidavits from the policemen denying their presence in the store at the time in question". (398 U.S. at 160). Nor is it like cases such as *Pollen v. Columbia Broadcasting System*, 368 U.S. 464 (1962), and *White Motor Co. v. United States*, 372 U.S. 253 (1963), also relied upon by petitioners, where motive and intent are in issue and the Court refused to be bound by self-serving declarations of the party whose motives and intents were dispositive. Nor is it like *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944) (Petition p. 7), where this Court reversed a summary judgment supported only by opinion evidence of experts, which was contradicted by a bulletin of the Federal Bureau of Mines, a stipulation of facts, an affidavit and the admissions of witnesses.

This case involves the uncontradicted testimony of an independent witness, a government employee having the duty and sole power to approve sales of subsidized vessels, that he would not have approved this sale whether approval was requested in late December as it was, or in early December as petitioner claims it should have been. Accordingly, there was no point in trying the issue of whether the approval should have been requested in early December.

CONCLUSION

The ruling by two courts upon reviewing the record that petitioner failed to create a genuine issue of fact on a proper Rule 56 motion does not present an important question of federal law unsettled by this Court or one in conflict with applicable decisions of this Court or a case otherwise calling for the supervision of the Supreme Court of the United States. The petition should be denied.

Dated, San Francisco, California
March 21, 1972

Respectfully submitted,

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